LIM TENG LENG

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-01-98-I]
3 APRIL 1998

CRIMINAL LAW: *Penal Code - Section 376 - Rape - Proof - Child complainant - Whether evidence of child corroborated - Mother of child giving exulpatory evidence - Exulpatory evidence not impeached - Whether could be accepted as the truth - Whether credible evidence adduced by prosecution - Whether offence proved beyond reasonable doubt - Evidence Act 1950, ss. 154, 155*

CRIMINAL PROCEDURE: *Sentence - Rape - Rape of a child - Accused sentenced to 13 years imprisonment and one stroke of the rottan - Whether adequate - Penal Code, s. 376*

EVIDENCE: *Corroboration - Sexual offence - Child complainant - Child giving sworn evidence - Whether evidence coroborated - Credibility of evidence - Demeanor of witness - Evidence Act 1950, ss. 154, 155*

The appellant was charged with an offence under s. 376 Penal Code, for the rape of a nine year old girl ('the child'). Before the learned Sessions Court judge, the child gave sworn evidence and described the events that led to the rape by the appellant. Her evidence, apparently, was corroborated by her teacher and also by the doctor who examined her. The child's mother, however, gave evidence which was exulpatory of the appellant. Notwithstanding the exulpatory evidence, the prosecution made no attempt to impeach the mother.

The learned Sessions Court judge, having apparently warned herself of the danger of acting on uncorroborated evidence, proceeded to make a finding, *inter alia*, that the child was telling the truth and that the defence, which was only a denial, had failed to raise any reasonable doubt on the prosecution's case. This apart, the learned trial judge had also discounted the exulpatory evidence of the mother, on grounds that she was not telling the truth. In the circumstances, the court, after having amended the charge in respect of the time of the alleged crime at the conclusion of the trial, convicted the appellant and sentenced him to 13 years imprisonment and one stroke of the rottan.

The appellant appealed and the main issues that arose were: (a) whether the trial judge was right in discounting the evidence of the mother, bearing in mind that the evidence was not impeached; (b) whether the trial judge had warned herself of the danger of convicting on uncorroborated evidence; (c) whether the evidence established beyond reasonable doubt that it was the appellant who raped the child; (d) whether the amendment to the charge had caused a miscarriage of justice; (e) whether the sentence passed was adequate.

Held:

[1] There cannot be an automatic accreditation of truthfulness to a witness merely because he was not cross-examined or impeached. The court, notwithstanding the lack of cross-examination or impeachment, is entitled to ascertain the truth or otherwise of the evidence of the prosecution witness.

[2] When a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot be washed off altogether. The judge may, after reading and considering the evidence as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his statement which is creditworthy.

[3] In the instant case, it was proper for the trial judge to have relied on her observation of the demeanour of the mother in arriving at the conclusion that the mother was not telling the truth. On the evidence, the trial judge did not err in discrediting the mother, particularly as regards her allegation that she was in the house at the relevant time.

[4] The learned trial judge had accepted the evidence of the doctor that the most probable cause of the tears of the hymen was penile penetration. On the evidence, it was perfectly within the law for the trial judge to have accepted the evidence of the child that it was the appellant who had raped her.

[5] Passages in the learned trial judge's judgment revealed that she was clearly aware of the danger of convicting on uncorroborated evidence. In any case, the evidence showed that the learned judge, in coming to the finding that it was the appellant who had raped the child, had never used the term 'corroboration' or 'corroborated'. The learned judge was clearly mindful of the fact that she had to be satisfied beyond reasonable doubt that the child was telling the truth, and consequently required no corroboration to come to that finding. That being so, the question of the learned judge acting on uncorroborated evidence did not arise.

[6] The amendment to the charge, which only restated the time frame within which the offence was alleged to have been committed, was not materially different from what it was before the amendment. The appellant, in any case, had declined to exercise the right to recall the witnesses for examination and explanation. There is therefore no merit in the submission that the appellant had not been able to make any explanation to the amended charge.

[7] The sentence passed is neither excessive nor unlawful. In imposing sentence, the court had taken into account the seriousness of the offence and the fact that a deterrent sentence is called for for this kind of offences. Clearly, any lesser sentence would not serve the purpose.

[Appeal dismissed.]

Case(s) referred to:
Babu Ram v. R, A [1937] A 754 ***(refd)***
Chiu Nang Hong v. PP [1965] 31 MLJ 40 ***(refd)***
Liow Siow Long v. PP [1970] MLJ 40 ***(cit)***
Loo Chuan Huat v. PP [1971] 2 MLJ 167 ***(refd)***
PP v. Kang Ho Soh [1993] 3 CLJ 2914 ***(refd)***
PP v. Salamah Abdullah & Another Case [1947] 13 MLJ 178 ***(refd)***
PP v. Tan Kim Kang & Ors [1962] 28 MLJ 388 ***(refd)***
R. v. Hartley [1972] 2 QB 1 ***(refd)***
Re Lim Yong Eng [1956] MLJ 79 ***(refd)***
Prafulla v. R 58 C 140 ***(refd)***
Willie Sodoi v. PP [1994] 3 CLJ 515 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112(i)
Evidence Act 1950, ss. 143, 146, 154, 155
Penal Code, s. 376

Other source(s) referred to:
Law of Evidence, Woodroff & Syed, 15th edn, p 812
Sarkar on Evidence, vol 2, 14th edn, p 2082

For the appellant - John Shek; M/s John Shek & Co
For the prosecution - Suhaimi Ibrahim DPP

Reported by WA Sharif

JUDGMENT

Ian HC Chin J:

This is an appeal by Lim Teng Leng @ Mohd Iskandar Lim Abdullah ("the accused") who was on 27 October 1997 convicted of the offence of rape of a nine year old girl ("the child") under s. 376 of the Penal Code and sentenced to 13 years imprisonment and one stroke of the rottan.

The Evidence

The evidence for the prosecution are these. On 25 April 1996 the child complained to her class teacher Suriani binti Rahim ("the teacher") that she was suffering pain in her private part and that it was bleeding. The underpant of the child was removed and examined by the teacher who found it to have been washed but still had blood stain. The teacher saw blood stain at the front part of the child's uniform. The child, according to the teacher, was not able to sit down because of pain in her private part. The child after being questioned told the teacher that her stepfather got on top of her. The teacher did not on that day take the child to the police station to make a police report because the principal, who must be consulted first, was not around. It was on 26 April that the child was taken to the hospital after another teacher came to tell this teacher that the child had problem sitting down. It was only then that it was decided to take the child to the hospital but the hospital attendant requested a police report be first made before the child can be treated. A police report was then made by the teacher and the child was later taken to the hospital by a woman inspector with a written request for the examination of the child. The woman inspector testified that the child told her she was raped by her stepfather. Dr Clarence Choo examined her on 26 April and concluded that there was penile penetration on account of the presence of fresh tears in the hymen and he was of the view that the tears could have happened within seven days of the examination. The doctor also detected an offensive smelling yellowish vaginal discharge due to an infection but this was not stated in the medical report. The doctor said he cannot trace the result of the test for the presence of spermeatozoa. The accused was tested positive for sexual potency but he was not tested for any sexual disease which may have caused the infection of the vagina. In any event there is no evidence of any test being conducted on the vaginal discharge.

The child gave sworn evidence. She described how during one night in April 1996 the accused carried her from her room to another room when her mother was working and while her elder sister, her aunt and two cousins were asleep in the same room. She described how she was raped by the accused. She said it happened on the night before she told the teacher the incident which placed it on 25 April. She described she cried in pain but the sound was stifled by

the accused putting his hand and her clothing over her mouth. Her other evidence touched on her complaint to the teacher, the trip to the hospital and to the police station all of which are not matters of dispute. The mother of the child also testified for the prosecution and it is her evidence that the defence placed reliance on for its contention that the accused should have been acquitted at the close of the case for the prosecution. This is because her evidence, according to Mr. John Shek, learned counsel for the accused, cast a doubt in the case of the prosecution. Learned counsel's submission was fastened on the fact that the evidence of the mother was not impeached.

Whether Unimpeached Evidence Must Be Accepted As The Truth?

The mother testified that the child was in 1997 eleven years old and that the child disliked the stepfather and that she disobeyed him. The mother said the previous husband deserted her when she was conceived with the child. The mother married the accused when the child was two years old. However, the mother when cross-examined, gave evidence which the learned Sessions Court judge in her judgment discredited and which judgment I will advert to later. The evidence of the mother elicited by cross-examination are these:

> [The child] did not sleep with me. I was residing at Pending when the child was born. We continued to stay at Pending after I married the accused. The family moved back to Bako two years ago. The house we stay in Bako belongs to my family. My parents and my sisters were staying with us in Pending. Two siblings stayed with me. They were in their twenties. Aminah was aged 20+, my brother was aged 20 years old. All the family members moved back to Bako together with me.
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> After the child was born, she slept with my mother. The child had never slept with me. The child slept with my sister after my mother passed away. Suraiya also did not sleep with me. She slept with my sister. My sister was married only this year. She is still staying with us. Suraiya, the child and my sister had always been sleeping in one room.
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> In 1996 I was working for a company called Mega Scope Sdn. Bhd. I arranged the woods. I worked on shift - day and night shift. My company had a punch card system. (A document shown). This is my punch card. I was on morning shift on 24th June 1996 from 6.30 a.m. till 4.30 p.m. I was off on 25th June 1996. I was off on 25 April 1996. I was on leave on April 24th - 25th 1996. I was at home on the night of April 25th and 26th. Ah Moh was also at home. We slept together in the same room on that two nights ie, April 25th and 26th. I was also at home on April 24th and I slept with [the accused] in the same room.
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> I disagree with [the child] when she said that I was working on the night of April 24th, 25th and 26th.
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> The child did not ever complain to me that she was disturbed by [the accused].

Relationship between [the child] and I is good. [The child] studied at Sekolah Gobel. One of the school teachers wanted to adopt [the child]. This was told to me by [the child]. I disagreed to adoption idea.

I visited [the child] in the hospital together with my sister Aminah. I asked [the child] why she was admitted. She replied that she had tooth extraction and stomach ache that day. The school teacher was not present. [The child] never informed me that [the accused] disturbed her. Aminah came to Court with me today. Suraiya is almost as tall as me. I made a mistake - Aminah did not come to Court today.

The police did not record any statement from me regarding this case. The police never inquired me whether I was at home and slept in the same room with [the accused] on April 24th - 26th, 1996.

I don't believe [the accused] had disturbed [the child] because I was always in the house.

Suraiya is alright with [the accused]. But not [the child]. My father likes my husband. Aminah also likes [the accused].

Clearly, those evidence are exculpatory of the accused and the learned Sessions Court judge was also of that view because she, in her judgment, dealt with that evidence on that footing. There was no application by the prosecution to invoke s. 154 or s. 155 of the Evidence Act 1950, to question or impeach the mother. Instead, the prosecution was content with a normal re-examination of the mother which resulted in the following evidence of the mother, *viz.*:

I was on leave on 24th April, 1996. It's an off day leave. I stayed at home and did not go anywhere. I slept at 1.00a.m. on 25th April, 1996. [The accused] slept before me. I usually sleep around 1.00 a.m. I stay up to watch T.V. or listen to radio. On that particular night, Aminah was awake and we two were chatting. I disagree that Aminah and my two girls went to sleep at around 9.00 p.m. Suraiya and [the child] slept around 10.00 p.m. [The accused] was at home that night.

I confirm that [the accused] had never informed that she was disturbed by the accused. I disagree that she did not tell me so because she was afraid of the accused. I agree that [the accused] did not like the accused. I disagree that [the child] disliked the accused because he had disturbed her. I disagree that [the child] did not inform me because she was quiet by nature.

The mother was also examined by the learned Session Court judge which yielded the following evidence:

I disbelieve [the child] when she told me the reason of her admission. I checked with Cikgu Kadir and Cikgu Suriani and they informed me that she had stomach ache. I believed them, [the child] was hospitalised for one month. I asked the doctor who examined [the child] everyday, he replied "normal". I don't know his name.

The learned Sessions Court judge discounted the evidence of the mother that was exculpatory of the accused because she was of the view that the mother was, for various reasons, not telling the truth. The reasons are: (1) the eagerness of the mother to help the accused by the way she answered certain questions when cross-examined and (2) the failure of the defence to produce through the mother the punch card to show that she was off-work at the relevant time in question though the punch card of other period was produced. In coming to that conclusion she was of the view, on the authority of *PP v. Kang Ho Soh* [1993] 3 CLJ 2914; [1992] 2 MLJ 360, that just because the evidence of the mother was not challenged the court need not accept her evidence as being the truth. She was also of the view that the mother was not an entirely disinterested party resulting in her evidence requiring corroboration if it was to be acted upon, relying on *Liow Siow Long v. PP* [1970] MLJ 40. It was thus that she commented on the failure of the mother to produce the punch card.

In *PP v. Kang Ho Soh*, it was, *inter alia*, held that merely because the prosecution had called a witness who was not challenged or impeached, it did not follow that he must be accepted as truthful. The relevant part of that judgment reads:

> The defence contends that because PW5 was not challenged or impeached the court should accept him as a witness of truth. If the prosecution was not relying upon his testimony it is contended that they should not have called him. As to this I hold that merely because the prosecution has called a witness it does not follow that he must be accepted as truthful. Teh Chong Hock is the accused's brother-in-law. I was not satisfied with the manner in which he answered the questions put to him. I have reservations as to whether he is a truthful person.

Unfortunately, no authority was cited in support of that conclusion. What then is the law regarding the issue? The various stages of the case have to be examined to see what ought to have been done. The prosecution must surely have orally examined all persons who are supposed to be acquainted with the facts and circumstances of the case and reduce into writing the statements made by such persons as required by s. 112(i) of the Criminal Procedure Code. Since it was obvious from the child's evidence that the rape took place in the bedroom of the accused which was also the bedroom of the mother and it happened in the absence of the mother, it was of paramount importance that the mother should have been interviewed and her statement recorded regarding her whereabout during the time the rape took place. This is important in many aspects. If the mother said she was at home and not working night shift as the child alleged, then it is a simple matter of checking with her employer as to whether the mother was or was not working that night and there will be record to establish that. If the mother's statement showed that

she was in fact working night shift, the mother should be called to give evidence to testify to that fact so that the child's evidence as to the mother working night shift will be corroboration in a very material aspect. If the mother gives any evidence which is not in accord with her statements to the police, then she could be questioned or impeached and may even be charged for perjury. As the case revealed, the company where the mother worked maintained a clock-in system for their workers and this means the punch card would be available to bear testimony as to the fact if in fact the mother was working during that time. All these, according to the mother, were not done and it resulted in the prosecution calling the mother to give evidence as to the age of the child but exposing the prosecution's case to the danger of not knowing what this witness was going to say in the witness box and with no statement of hers to remind her of what she had said to the police. No prosecution would call any witness if it is not sure what the witness evidence is going to be like and the prosecution should know what the evidence is going to be like because statements would have been taken from all potential witnesses. It is only after a statement had been taken from the mother that the prosecution would be able to tell whether the mother was or was not telling the truth when she said she was in the bedroom when the rape was alleged to have taken place. But that alone should not mean the end of the case for the prosecution. The overall evidence ought to be looked at. It has also to be considered whether the learned Sessions Court judge was entitled to conclude that the mother, who was called by the prosecution, was not telling the truth.

If the mother had in her statement said she was on night shift at the relevant time and then in court testified that she was not but at home, then it would be in the interest of justice that the truth ought to be revealed. Section 154 of the Evidence Act 1950, would come into play. That section says:

> The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

If the prosecution was in possession of a statement made by the mother which contradicts what the mother said in court, then it is the duty of the prosecution to invoke s. 154 of the Evidence Act 1950, in order to put questions to the mother that she had in her statement given contradictory facts. The principle behind the section is said by Woodroffe & Syed on *Law of Evidence*, 15th edn, p. 812, to be this:

> Principle. A party may with the permission of the Court, put leading questions to the witness under the provisions of s. 143 or cross-examine him as to the matter mentioned in ss. 145 and 146. The rule, which excludes leading questions, is chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called; whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the judge may, in his discretion, allow the rule to be relaxed. Further, by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test his credit, or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where there is a surprise, the witness unexpectedly turning hostile, in which and in other cases the right of examination *ex adverso* is given. And when the defence has elicited new matter from a witness for the prosecution in cross-examination, the Court may, under this section, permit the prosecution to test the witness's veracity on this point by cross-examining in turn. A witness, whether of the one or the other party, ought not to receive more credit than he really deserves; the power of cross-examination is therefore sometimes necessary for the purpose of placing the witness fairly and completely before the court.

The said authors, at p. 819, remarked that the discretion is wide and unfettered, *viz:*

> The discretion of the Court under Section 154 is wide and unfettered; it does not depend upon hostility. The discretion should be exercised liberally whenever it appears to Court that due to the demeanour, attitude way of answering question of the witness or the tenor of his answers or other reasons permission should be given in the interest of justice.

However, the said authors, at p. 824, also sounded the warning that the exercise of the discretion must be with sufficient reason. This is what they said:

> But the discretion has always to be exercised with caution. It should not be exercised without sufficient reason. The reason should be stated because, by offering a witness, a party is held to recommend him as worthy of credence and so, in general, it is not open to him to test the witness's credit or impeach his truthfulness. Where reasons are not recorded, it would not be a case of valid exercise of discretion under Section 154 of the Evidence Act.

Sarkar on Evidence, vol. 2, 14th edn, p. 2082, elaborated on the situation of an unfavourable prosecution witness in these terms:

> It is not open to the prosecution in a criminal trial to cross-examine their own witness unless the court declares him to be a hostile witness [*Jogdeo v. R*, 1P 758: 71 IC 117: 25 CLJ 69]. Unless there is something in the deposition of a witness which conflicts with the earlier statements made by him which will afford ground for thinking that he has been gained over by the defence, the

prosecution is not entitled to declare him hostile [*Parameshwar v. R*, 99 IC 705: A 1926 P316]. It is the established practice that a court would not allow a party to question him under s. 154 until it is satisfied that there is some hostility or adverseness displayed by the witness to the very party who has called him [In *re Kalu Singh*, A 1964 MP 30]. It is not right for the public prosecutor to declare a prosecution witness hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the judge. It is the duty of the public prosecutor to formally ask the leave of the court to cross-examine the offending witness both in regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally [*Samar Ali v. 166* IC 323; A 1936 C675]. Before granting permission to treat a witness as hostile, there must be some material to show that he is not speaking the truth or has resiled from his earlier statement [*Gopal Krishnan v. State*, 1981 Cri LJ NOC 160 (Delhi)]

In the present case, there is nothing in the record to show that the prosecution had asked for permission to put questions that could be put in cross-examination to the mother concerning her evidence that she was at home at the relevant time and that therefore the accused could not have raped the child without her knowing it. The reason for the omission that was proffered by the prosecuting officer can be found in his reply to the submission of no case to answer, *viz:*

Testimonies of PW7 [the mother]

Your Honour, the primary intention of the prosecution calling this witness was to tell this Honourable court the age of the victim (PW4) in view that PW4 has no birth certificate. As this witness is the real mother of PW4 and the only person who can give accurate testimony on PW4's age, the prosecution therefore has no alternative except to call her. Nevertheless, on the part where she (PW7) told the court that she was at home and sleeping with the accused at the time the incident took place, I would like to humbly urge and beg This Honourable court not to consider and to attach no weight to this piece of testimony on the ground that she (PW7) is an INTERESTED PARTY to this case. Your Honour, PW7 is the present wife of the accused and being in such a position, she is surely to give evidence in favour of the accused. Moreover, the prosecution could not challenge her evidence as she was called by the prosecution and the prosecution was also in a position whereby the prosecution could not impeach her credit as the prosecution requires her (PW7's) evidence on the age of the victim (PW4).

The position taken by the prosecutor shows that he was labouring under a misapprehension of the law regarding the position of a prosecution witness who has been cross-examined or impeached. The prosecutor took the wrong view that if you cross-examine or impeach the mother, even her evidence as to age is also of no value. That appears also to be the stand taken by Mr.

John Shek, learned counsel for the accused. That, in my opinion, is an erroneous view of the law as can be seen from what was said in *Prafulla v. R*; 58 C 1404: 35 CWN 731: 53 CLJ 427: A 1931, C 401 (referred to in *Sarkar on Evidence,* vol 2, 14 edn), *viz:*

> ... Either party may rely on the evidence of a witness who is cross-examined by the party calling him. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. The rule of law is that it is for the jury to say. The evidence of such witness is not to be rejected either in whole or in part. lt is not also to be rejected so far as it is in favour of the party calling a witness, nor is it to be rejected so far as it is in favour of the opposite party.

When a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot be washed off altogether. The judge may, after reading and considering the evidence as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his statement which is creditworthy. See in *Sarkar on Evidence,* vol. 2, 14th edn, p. 2085.

I have earlier when referring to *PP v. Kang Ho Soh* remarked that no authority was cited for the proposition of law there stated, which is that merely because the prosecution had called a witness who was not challenged or impeached, it did not follow that he must be accepted as truthful. However, it seems to me that the authority for that proposition can be found in *Babu Ram v. R, A* [1937] A 754. The relevant part of the judgment of that case, in which a person was charged with receiving a stolen buffalo, reads:

> The second point arises out of the evidence of Wazir Khan. He was produced as a witness by the prosecution. The learned Judge says that he has deposed that Jagannath sold the buffalo and executed the receipt, and the prosecution made no application to the Magistrate to the effect that the witness was hostile. I do not know upon what section of the Evidence Act or upon what other law the learned Judge bases his general proposition that a party is bound by the evidence of a witness whom he produces. No part of the statement of such a witness amounts as far as I know to be an admission on behalf of the party producing him. In some circumstances a Court which is deciding a question of fact may say that a party produces a witness presumably because he believes that he is a witness of truth and, therefore, if the witness says something contrary to the interest of the party producing him, the statement must be regarded as having considerable weight. I do not think that it is possible to go further than that. Nor do I know of any rule of law that a party is not able to say that a witness produced by him is not speaking the truth upon some particular point unless he makes a written application to say that the witness is hostile. The provision of the Evidence Act allows a party with the consent of the Court to cross-examine his own witness. I may mention that this Court

has more than once complained that public prosecutors have not produced witnesses who alleged they had knowledge of the facts or who might have been supposed for some reason possibly to have knowledge of the facts.

If it were argued that the prosecution were bound by the evidence of these witnesses, their position would be impossible. In the first place it would be urged that they had not done their duty because they had failed to produce the witness even they did not believe that the witness was speaking the truth and on the other hand, if they did produce the witness, it would be urged that they would be bound by the witness' statement. In this case presumably as the receipt was in existence and purported to have been drawn up by Wazir Khan, the prosecution felt that it was only fair that they should produce Wazir Khan before the Magistrate who might then be in a position to say whether he was or was not speaking the truth. It by no means follow that they themselves relied upon his evidence in any particular whatsoever, much less that it must be inferred because the prosecution produced the witness that he must have been speaking the truth and that the accused person was not guilty of the offence with which he was charged.

I am also in agreement with the two cases just mentioned that there cannot be any automatic accreditation of truthfulness to a witness merely because he was not cross-examined or impeached. The court, notwithstanding the lack of cross-examination or impeachment, is entitled to ascertain the truth or otherwise of the evidence of the prosecution witness. In this regard the learned Sessions Court judge did not err. But it must be borne in mind that since the prosecution produced the witness, it must be, that in the first instance, she is paraded as a witness of truth. Therefore, there must be some indication that the witness is not telling the truth before the court can embark on an exercise of discrediting the witness. If there was a statement recorded under s. 112(i) of the Criminal Procedure Code which contradicts the witness testimony, that would be a sufficient starting point. However, there is none in this case and the learned Sessions Court judge had to, as mentioned early, rely on the fact of (1) the eagerness of the mother to help the accused by the way she answered certain questions when cross-examined and (2) the failure of the defence to produce through the mother the punch card to show that she was off-work at the relevant time despite producing a punch card for other period to support her testimony that she was off-duty at the other period. The mother's evidence was also considered in the light of the other evidence which I will advert to when I consider the other grounds of appeal. In so far as relying on her observation of the demeanour of the mother to arrive at the conclusion that the mother was not telling the truth, one cannot find any fault there. As for the reason (2), the learned Sessions Court judge had observed the spectacle of the mother producing a punch card to supposedly support her assertion that she was off-duty and was with the accused during the period but the punch card was discovered to be for another period. This spectacle,

apart from supporting the learned Sessions Court judge decision that the mother was eager to help the accused, also justified the conclusion that if the mother wanted to be accepted as a truthful witness, she would surely be in a position to produce the relevant punch card but did not. Though ordinarily the mother, because she is the prosecution witness, was supposedly a witness of truth, the learned Session Court judge was entitled to conclude from her demeanour and from her failure to produce the relevant punch card that she was not a truthful witness. Again, I am of the view that the learned Sessions Court judge did not err in discrediting the mother on this ground as regards her allegation that she was in the house at the relevant time. Mr. John Shek had also submitted on other grounds that the learned Sessions Court judge was wrong in concluding that a case beyond reasonable doubt was made out at the end of the case for the prosecution. It is to those grounds that I will now turn to.

Whether The Learned Sessions Court Judge Had Warned Herself Of The Danger Of Convicting On Uncorroborated Evidence?

Mr. John Shek had submitted, ground 3(c)(i) of the petition, that the learned Sessions Court Judge had failed to warn herself of the danger of convicting without corroboration and that her mind on this matter had not been revealed, citing in support *Chiu Nang Hong v. PP* [1965] 31 MLJ 40. In *Chiu Nang Hong's* case the accused was convicted of rape when there was a direct conflict of evidence between the accused and the complainant as regards whether there was consent for the intercourse. The trial judge believed the complainant that she was frightened into submission and concluded that: "I could not but come to the conclusion that she was speaking the truth and that in all the material circumstances her evidence was corroborated by the facts." It was urged in the Privy Council that the passage ought not to be accorded its ordinary meaning but rather that "corroboration" was used in the sense that the circumstances were consistent with the complainant's story but the Privy Council declined to do so. The Privy Council concluded that the judge had convicted the accused on the basis that the complainant's allegation was corroborated when it was not and the Privy Council further on in their judgment said this:

> Their Lordships would add that even had this been a case where the learned Judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed.

Did the learned Sessions Court judge warn herself in terms that satisfy the standard set by *Chiu Nang Hong* case? This is how the relevant part of her judgment sounded, *viz:*

> In the Law of Malaysia there is no rule of law which requires the evidence of a tender child must be corroborated. Section 133A of Evidence Act provides that any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him. Where the evidence of the child witness is received upon [oath] as in this case, there is [no] rule of law demanding that such evidence should be corroborated. However, as a matter of prudence, the court is mindful of the danger of accepting evidence of child of tender age without corroboration. In cases of rape the court will also consider the children capacity of confusing fantasy with reality (*Loo Chuan Huat v. PP* [1971] 2 MLJ 167 FC). To all these I have cautioned myself when evaluating the evidence of [the child].

That passage, in my view, shows that the learned Sessions Court judge had amply warned herself of the danger of acting on uncorroborated evidence. Mr. John Shek did not refer to the passage and therefore had not said how it can be said that it does not reveal the fact that the learned Sessions Court judge's mind was clearly aware of the danger of convicting on uncorroborated evidence. There is, therefore, no merit in this ground of appeal.

It was also submitted that the learned Sessions Court judge had erred in concluding that there was corroboration when there was none. Did the learned Sessions Court judge require corroborative evidence? Mr. John Shek did not point to any particular passage of the judgment where the learned Sessions Court Judge had said she required corroboration. In fact, by cautioning herself of the danger of uncorroborated evidence, *supra*, it would appear that she required no corroboration in the evidence of the child. Mr. John Shek had submitted that the police report and the teacher's testimony that she had been told by the child that she (the child) was disturbed could not amount to corroboration. But the learned Sessions Court judge never referred to those evidence as amounting to corroboration. However, the term "corroboration" or "corroborated" was used several times in her judgment after she had warned herself of the danger of convicting on the uncorroborated evidence of the child. It remains to be examined in what context the terms were used. The child had complained of great pain after the rape and the learned Sessions Court judge concluded that it was true in these words:

> It is abundantly clear from the evidence of PW1 and PW5 that [the child] was in great pain on 25 April 1996. Their observation corroborates [the child's] evidence that she experienced pain in her private part when the accused was positioned on top of her and also after he got off from her. She said that she experienced this pain when she is sitting or walking. She felt the pain on the next morning. To my mind the evidence which I have just described had corroborated [the child's] evidence that she suffered pain as the result of the sexual intercourse. She is further corroborated by PW2 who testified that it was very difficult to conduct speculum examination on the vagina because of the pain experienced by the patient. According to him the top of the vagina appeared red and the uterus and cervics were painful to touch. These show that the pain experienced by [the child] was not feigned but genuine. For the reasons given in the above, I am satisfied that there was sexual intercourse and penetration.

The learned Sessions Court judge was mindful of the fact that she must be satisfied beyond reasonable doubt that the child was telling the truth when she complained of pain. The learned Sessions Court judge proceeded to make such a finding after giving the reasons, none of which can be faulted. What the evidence showed was that the pain was continuing even up to the time the doctor examined the child. Such a finding was necessary as a result of the submission of learned counsel at the lower court that the tear in the hymen was caused by the child falling off a bus or by fingers or by other object which the learned Sessions Court judge discounted. It was in the context of establishing pain that it was found that the child's evidence was corroborated by the two teachers and by the doctor. This is beyond doubt as the learned Sessions Court judge went on, further down the judgment to say:

> I had earlier made a finding of fact that her observation on the pain suffered by [the child] is corroborated by PW5, PW2 and PW19.

In so far as the finding that it was the accused who raped the child, the learned Sessions Court judge did not once use the said term. It is clear to me that she required no corroboration. Therefore, the question of the learned Sessions Court judge acting on uncorroborated evidence does not arise. I turn now to the question of whether it was the accused who raped the child.

Is There Evidence To Establish Beyond Reasonable Doubt That It Was The Accused Who Raped The Child?

The contentions of the accused in relation to this ground are that (1) there was no evidence of penetration and (2) there was no evidence that it was the accused who had sexual intercourse with the child.

Was there penile penetration?

The learned Sessions Court judge in regard to the question of penile penetration had relied on the medical evidence that came from Dr. Clarence Choo who gave evidence that it was more probable than not that there was penile penetration because of the fresh tear in the hymen which happened within seven days of his examination. Though he had earlier when cross-examined said that the tear could have been caused by penile penetration or by fingers or by wood but he later ruled out the latter two because of the redness in the vagina and because of the absence of larceration. The doctor revealed when cross-examined that he took a wet smear to determine the presence of spermatozoa but he could not find the report of the test. The learned Sessions Court judge also took into account the facts (1) that the child had told the teacher the incident, (2) that the teacher's observation of blood stain on the panty and the dress of the child, (3) that the observation of the other teachers of the inability of the child to sit upright due to the pain from the private part and (4) the observation of the doctor that the child recoiled with pain when there was an attempt to examine the private part, to satisfy herself that there was sexual intercourse. Against these evidence, Mr. John Shek submitted that a case beyond reasonable doubt had not been proved because (1) the doctor had said that there were only partial tears in the hymen which could be caused by any one of the three things, *viz:* penile penetration or finger or wood, (2) the doctor had said the pain could be due to the infection of the uterus contracted during the intercourse and yet there was no evidence that the accused was so infected, (3) the lost of the test for the presence of spermatozoa and (4) the evidence of the mother that she was at home when the alleged rape took place but did not see any rape taking place.

As for (1), the learned Sessions Court judge had, as I mentioned earlier, already dealt with it when she accepted the evidence of the doctor that the most probable cause of the tears of the hymen was penile penetration. Therefore, there is no doubt at the prosecution stage of the case that it was penile penetration.

As for ground (2), the learned Sessions Court Judge had accepted the fact that the police were unaware of the finding of infection of the vagina as Dr. Clarence Choo did not testify that he had informed the police and consequently the police did not follow up with an examination of the accused though it was likely that the accused was the source of the infection. If the accused had been tested and there was a failure of the prosecution to produce the result of the test, then it could be inferred that the evidence if produced would be adverse to the case for the prosecution. However, the accused was not tested and no such inference can be drawn and it should not cast any doubt on the case for the prosecution.

Learned counsel did not raise the matter of the loss of the spermatozoa test result in the lower court, ground (3), and consequently the learned Sessions Court judge did not have the opportunity to address her mind to this contention. However, she was aware of the missing result but was nevertheless satisfied that a case beyond reasonable doubt was made out. The absence of the result of the test must be viewed with the evidence of the fresh tears of the vagina. There was at that stage of the case no evidence to suggest that any thing else other than the penis of the accused that caused the tears of the vagina.

As for the evidence of the mother that she was at home and therefore did not see the accused raping the child, ground (4), this was dealt with by the learned Sessions Court judge when she discredited her for the reasons which I have already earlier gone into and which I could find no fault in her conclusion. Again, I am of the view that the evidence of the mother did not prevent a case beyond reasonable doubt from arising at the close of the case for the prosecution.

I turn now to the question of whether there was evidence that it was the accused who had sexual intercourse with the child.

Who Raped The Child?

Learned counsel had submitted the same grounds which I have enumerated earlier in support of his contention that it was not proved beyond reasonable doubt that it was the accused who had sexual intercourse with the child. I have already dealt with the grounds and concluded that they have no merits. Therefore, this contention of learned counsel that there was no evidence beyond reasonable doubt that it was the accused who raped the child also has no merit. It was perfectly within the law for the learned Sessions Court judge to have accepted the evidence of the child that it was the accused who had raped her.

Mr. John Shek had argued that the learned Sessions Court judge should have insisted on corroboration of the evidence of the child. However, learned counsel had by referring to various authorities conceded that corroboration was not as a matter of law required. The learned Sessions Court judge had addressed herself on all the points raised by learned counsel concerning (1) the evidence of the child being contradicted by the mother and the child's inability to tell the time the rape took place, (1) the reason the police report was made by the teacher, (3) the statement by the child to the teacher and (4) the medical report which I had earlier mentioned and which the learned Sessions Court judge had dismissed as not raising any doubt as to the existence of a case beyond reasonable doubt being established. I am of the view that the learned Sessions Court judge was right in her conclusion since she had the benefit of listening to the evidence and of observing the demeanour of the witnesses.

There are grounds of appeal which I will not detail them here but which I would have dealt with by the conclusions that I have already arrived at. It suffice for me to say that they have already been addressed by me. The other grounds that I have to deal with are directed specifically at the way the learned Sessions Court judge considered the evidence for the defence.

Whether The Learned Sessions Court Judge Had Erred When She Disbelieved The Defence.

It is necessary to state in some detail the evidence adduced by the defence and which the learned Sessions Court judge had dealt with, in my view, exhaustively. The accused gave a statement from the dock and this was all that he said:

> I reside at Lot 1238, Jalan Bako, Kuching. I denied the allegation of rape made by (the child). I really did not do it as I had told the Court in trial within the trial.

The aunt (DW2) of the child and also the sister-in-law of the accused testified for the defence. The learned Sessions Court judge summed up and dealt with the evidence in this manner and it would be best if what she said is reproduced here in order to appreciate the contentions surrounding this part of her judgment, *viz*:

> Accused elected to give an unsworn statement. He said that he really did not do it as he had told the court in a trial within trial. To corroborate his claim of innocence, defence called DW2 ... who is the sister-in-law of the accused and the aunt of [the child]. DW2 testified in evidence in chief that she was staying together with [the mother], the accused, [the child] and her late father in the same house owned by her late father. She had stayed with [the child] in the house ever since [the child] was born and they have been sharing the same bedroom ever since [the child] was eight years old. DW2 said that she went to bed usually at between 12 midnight and 1.00a.m. because she stayed up to watch TV. DW2 said that [the child] looked normal when she went to school on the morning when she made a complaint to her teacher. It was a Friday. She claimed that she was at home on the night before ie, Thursday. She claimed that [the mother] was also at home on 23rd and 24th but she cannot remember which month. According to her [the child] went to bed at between 8.00p.m. and 9.00p.m. while she stayed up to watch TV with [the mother]. She said that the accused returned home at around 10.30p.m. She retired to her bedroom between 12 midnight and 1.00a.m. while [the mother] and the accused went inside their own bedroom. When she went inside her bedroom she saw that [the child] was already asleep with her children.
>
> DW2 claimed that she and [the child] loved each other. She treated [the child] as her daughter having looked after her from young. She said that [the child] did not tell her about the incident and she surely would scold the Accused if he had done such a thing to [the child]. So far she had not scolded him and

she does not believe that something had happened. She reiterated that nothing had in fact happened in the house. At this juncture the court observed that witness looked downcast. She further testified that the accused continues to stay in the house after the alleged incident and even after her father had passed away in August 1996. According to DW2 the police had neither interviewed her nor recorded a statement from her in connection with this case. She said that she visited [the child] everyday in the hospital and [the child] never told her that she was raped by the accused.

In cross-examination DW2 said that she had a boy aged eight and girl aged six from an unregistered marriage which had broke up sometime ago. She used to work when her mother was alive but she has stopped working since her mother had passed away in 1995. She has been staying in her late father's house even before her relation with the first husband had broke up. We heard from her that she was a housewife in April 1996. She claimed that her father who was paralysed and looked after by her, supported her and the two children from his saving. According to her the accused supported only his own family. However, the Accused gave money to [the mother] to buy food provisions and everyone in the family, her own family included, ate together. DW2 admitted that her relationship with the accused is good. However, she would not support him if he had done wrong. DW2 disagreed that she and her family depended on the accused for daily support since she is not working. She insisted that she depended on her sister and she is now remarried. She however agreed that the accused bought the food provisions and that around the time of 1996 until she remarried, she depended on the accused for support. She agreed that she needed to have good relation with the accused and PW7 because she and her family had to eat the food bought with the accused's money. DW2 also informed in evidence in cross that she has remarried in July 1996 and she is still living in the same house. Asked what movie she was watching on that night. DW2 cannot remember the title of the movie. She remember that she was at home that night. She testified that after returning home the accused took his bath and dinner, chatted with friends who came to visit with him while she and PW7 watched TV together. She said that she did not know what the accused did only after he entered his bedroom. To the question that suggested that she was only guessing the date when she said that she was with her sister on Thursday night, DW2 replied that the day was Thursday and the date was 23rd. DW2 also said that she is aware of the nature and the punishment of the offence the accused is charged with but she maintained that the accused did not do it because she was staying in the same house and she did not see it. In insisting that nothing had happened, DW2 said that the allegation came from the teacher (I believe she was referring to PW1). She disagreed that she felt obliged to help the accused because she and her family had to some extent depended on the accused for livelihood. She disagreed that she was guessing when she said the day was Thursday 23rd. In re-examination, DW2 said that she stayed at home after 8.00p.m. every night. She also said that she does not depend on the accused anymore after she had remarried. She claimed that she would not help the accused if he is in the wrong, especially if he had disturbed

her niece. She further said that in local Malay, malam Khamis means Wednesday night. She was referring to Wednesday night when she mentioned malam Khamis.

Defence contended that the accused's unsworn evidence is supported by the evidence of PW7 and DW2, hence it is not a mere denial. As far as PW7's evidence is concerned, I have earlier given my reasons why I disregard it and I do not intend to repeat it here. Having perused the evidence of DW2 and having observed her demeanour in court, I am led to believe that she is not a neutral party, either. I have no doubt that [the child] and DW2 were very close to each other having stayed together and the latter seeing [the child] growing up and sharing the same bedroom. Be that as it may, I have strong reasons to believe that DW2 had, out of her obligation (though she denied it) to the Accused, had to testify for her brother-in-law. First of all, despite her insistence that, prior to her father's death in August 1996, she and her two children were supported by her late father from his savings and that her new husband is supporting her now after she remarried in July 1996, the fact remained that she was a housewife since 1995 after her mother's death and she was still a housewife in 1996, and that she and the two children ate the food that were bought by PW7 with the money provided by the Accused. That explained, I believe, why DW2 looked so miserably downcast when she testified for the Accused.

DW2 testified in evidence in chief that her sister PW7 was at home on 23rd and 24th. In cross-examination she said she was referring to Thursday 23rd. In re-examination she said malam Khamis means Wednesday night in local Malay. It should be observed that DW2 evidence on the dates are very evasive and unconvincing. First of all she cannot even remember the month. Secondly she referred to the day as Wednesday 23rd. There is undisputed evidence from PW1 that she received the complaint of pain from [the child] on 25 April, 1996 (which, according to the Almanac, is a Thursday) and [the child] had also said that the incident happened the night before she complained to PW1. It is therefore clear that the dates in question are sometime between the night of April 24th and the wee hours of 25th. In the light of this, DW2's evidence pertaining to the date being 23rd of unknown month becomes unreliable. It is more likely that she was guessing the date.

DW2 testified that nothing had happened. If it had she would have told off the accused and would not help him. She said that the accusation started with the teacher. I have earlier said that although PW1 had tried to adopt [the child] unsuccessfully, I do not believe that PW1 would thereby frame the Accused. It is also significant that this allegation has never been put to PW1 in cross-examination.

In light of the above and bearing in mind that DW2 had for more than one year, cater the foods bought with the money given by the accused and the fact that they are still staying together on good terms in the same house, I disbelieve DW2 when she claimed that nothing had happened at all. The medical evidence has established beyond reasonable doubt that [the child] was

subjected to sexual intercourse by penile penetration. I believe the doctor who had explained why the hymen tear could not be caused by wood or by finger. Something had happened to [the child] between 24 and 25th April, 1996 at between the time she went to bed and the incident happened and according to [the child], she was raped by her stepfather, the accused person. I strongly regard DW2 as less than honest when she said nothing happened.

Accused's own testimony is brief to the extreme. In two short sentences he told the court that he did not do it as he had told the court in trial within trial. I do not think the evidence adduced in the trial within trial can be relied on because therein the parties are concerned with only the voluntariness of the cautioned statement. Moreover, any denial made by the accused therein would not and could not be challenged by the prosecution because that was not the question in issue.

The law regarding an accused person electing to make a statement from the dock is dealt with in *Udagan Alagan v. P.P.* [1962] MLJ 39 wherein Thomson J said that although an accused person is within his legal rights when he elects to make a statement from the dock instead of giving evidence from the witness-box, in a case which must in the event depend on credibility, he takes his course at his own peril. The rule was stated in Shimmin's case 15 Cox C.C. 122, 124 by Mr. Justice Cave in a passage which, so far as I am aware (and I am quite prepared to be told I am wrong), has never been criticised:

> A prisoner, though defended by counsel, may, if he chooses, himself make his statement to the jury. He ought to be heard in his defence, and have the opportunity of making his explanation of the circumstances proved against him. True, his statement was not made on oath, and that he was not liable to be cross-examined by the prosecuting counsel, and what he said was therefore not entitled to the same weight as sworn testimony.

Faced with such a serious charge, it is interesting to see that the accused, other than denying committing the offence, has elected not to make an explanation of the circumstances proved against him. Instead he just relied on PW7 and DW2 whose evidence I have evaluated and attached very little weight thereto. Having regard to the totality of the case, I do not think the defence has cast a reasonable doubt on the prosecution's case. Accordingly I convict the accused as charged.

Whether Questions Should Have Been Allowed?

Mr. John Shek submitted that the learned Sessions Court judge had disbelieved DW2 on the basis that DW2 felt obliged to help the accused since the accused had supported DW2 and her children when, according to learned counsel, there was no evidence of such support. Learned counsel submitted there was no such evidence because the evidence that was elicited in cross-examination should not have been allowed. This is what happened during the cross-examination of DW2 as the notes of proceedings reveal:

P: Since you are not working, since you have to support your children and yourself, you depend on the accused for daily support.

A: I depend on my sister. I am now remarried.

P: Around the time of 1996, until you remarried, you depended on the accused for support

Defence Counsel: Put on record that the witness had already answered that she depended on her father.

A: I agree that my brother-in-law buys the food everything.

Q: Because the accused buys food everyday and you have to eat the food, therefore you need to have a good relationship with the accused.

A: Yes. Also with my sister.

Q: Do you agree that you also depend on Yong for your daily livelihood.

A: Yes, after my father passed away, I don't now because I am remarried. I remarried on 15 July 1996. After I remarried I still stay in the same house.

It will be recalled that the learned Sessions Court judge had concluded that DW2 and children had been supported by the accused which the prosecution was able to elicit from DW2 as a result of the said cross-examination. Mr. John Shek argued that the prosecution should not have been allowed to question DW2 in the manner indicated by the notes of proceedings, *supra*, and if that had been done, there would not have been this evidence. Learned counsel did not elaborate under what law the learned Sessions Court judge was entitled to prevent a cross-examination that tended to revealing the truth. Whatever questions that have been put in cross-examination by the prosecution were, I am of the view, within the limit laid down by ss. 143 and 146 of the Evidence Act 1950. DW2 was pressed to answer whether the accused supported her and her children in their livelihood during the time she was not able to do so and this was after DW2 had given evidence that her father supported her when he was alive and when she remarried. The prosecution sought to narrow down her answers to specific period and it was due to this process that it was revealed that DW2 was at the relevant time out of work and had depended on the accused. I am unable to see and learned counsel had not been able to say what law was infringed when the questions and answers, *supra,* were allowed.

Whether There Was Miscarriage Of Justice

Mr. John Shek had submitted that the learned Sessions Court judge was unfair, unjust and prejudicial to the accused when she, in the concluding part of her judgment, made the following remark, *viz:*

> Faced with such a serious charge, it is interesting to see that the accused, other than denying committing the offence, has elected not to make an explanation of the circumstances proved against him. Instead he just relied on PW7 [the mother] and DW2 whose evidence I have evaluated and attached very little weight thereto. Having regard to the totality of the case, I do not think the defence has cast a reasonable doubt on the prosecution's case. Accordingly I convict the accused as charged.

Learned counsel submitted that "there is no possibility for the appellant to make any explanation to the amended charge framed by the learned trial Sessions Court judge herself." I will deal first with the question of the amendment of the charge which was referred to and contended by learned counsel to be wrong.

The initial charge stated the time of offence to be "on or sometime in April, 1996. This was, upon the application of the prosecution, amended to read: "on 24 April 1996 at 11.30pm thereabout". After the conclusion of the trial, judgment was reserved to be delivered on 15 October 1997 but this was changed to 19 October 1997 on which date the learned Sessions Court judge amended the said part of the charge to read: "sometime between the night of 24 April 1996 and the wee hours of 25 April 1996". The accused after being explained the amended charge, pleaded not guilty. The prosecution then informed the court that it does not propose to recall any witnesses while the accused stand-in counsel requested an adjournment to allow learned counsel to consider the question of the recall of witnesses. The court then adjourned to 27 October 1997 whence the stand-in counsel informed the learned Sessions Court judge that the defence did not want to recall any witnesses. The court then delivered its judgment and convicted the accused. Learned counsel submitted that the amendment was unjust and relied on *PP v. Salamah binte Abdullah & Anor Case* [1947] 13 MLJ 178 and *PP v. Tan Kim Kang & Ors* [1962] 28 MLJ 388.

Salamah binte Abdullah & Anor case concerns a situation where a more serious charge of theft in a dwelling house was substituted for the original charge of dishonest receiving at the close of the case for the defence and it was based on the evidence of the accused in that case. The conviction on the new charge was quashed on appeal and a conviction for the original charge was substituted. It was in the context of those facts that the following judgment in that case must be viewed:

> Now the proper time to amend a charge is at the close of the prosecution. This is expressly provided by Section 173(h) of the Code which, indeed, not merely authorises but positively requires the Court to consider the charge at that stage and, if necessary, amend it. It is true that a charge can be altered at any stage and the alteration in this case, late though it was, is not illegal in the sense that it was not in accordance with the Code but in my view it was in the circumstances unjust.

The court had ruled that it was unfair because it had relied on the evidence of the accused to amend the charge when the law requires the prosecution to prove its case. In the present case there was no substitution of a more serious charge for a lesser case. The amendment involves only restating the time frame differently within which the offence was alleged to have been committed but which in effect was not materially different from what it was before the amendment. In fact the learned Sessions Court judge would have been perfectly entitled to say that the offence had been proved to be committed within the time specified in the charge that was amended at the close of the case of the prosecution, that is, "on 24 April 1996 at 11.30pm thereabout". I had the occasion to deal with the matter of the specification of time of the commission of offence in *Willie Sodoi v. Public Prosecutor* [1994] 3 CLJ 515, 517 where I said:

> It is laid down by s. 153(i) of the Criminal Procedure Code that a charge should contain particulars as to time, place and person, *viz:*
>
> > The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.
>
> Therefore, a charge should at least state the time the offence was alleged to have been committed. In this case, the charge alleges the offence to have been committed sometime in February 1991 which I think is reasonably sufficient notice of the matter charged. See *Re Lim Yong Eng* [1956] MLJ 79. Since a charge requires the date of the alleged commission of the offence to be stated, the evidence that go towards supporting the charge should likewise establish the approximate date in which the offence was committed. The evidence in this case failed to do so. They are not specific and accurate enough as to require the accused to enter upon his defence. How could anyone answer an allegation that he had on an unknown date stolen cocoa beans. I am inclined to agree with the observation of the Court in *R. v. Hartley* [1972] 2 QB 1, C.A. where it is said that where the words "on or about [the date] are used", to render a verdict of guilty lawful the offence must be shown to have been committed "within some period which has a reasonable proximation to the date mentioned in the indictment."

As for *PP v. Tan Kim Kang & Ors* case which was also relied on by learned counsel, the facts there are also radically different. Anyway, the court there held that it was in order to amend the charge after the defence was called though it expressed the view that such a course should be taken with great caution. This case is also of no help to the case of the accused.

Returning now to the contention that "there is no possibility for the appellant to make any explanation to the amended charge framed by the learned trial Sessions Court judge herself," I do not see how this submission can be sustained. The accused declined to exercise the right to recall the witnesses for examination that was opened to him and to explain and consequently to, on a balance of probabilities, cast a doubt in the case for the prosecution. I turn now to the final question which is that of the sentence.

Whether The Sentence Was Inappropriate?

Learned counsel had submitted that the sentence was too severe and that the learned Sessions Court judge had failed to consider the background of the accused. The learned Sessions Court judge had sentenced the accused to 13 years imprisonment and one stroke of whipping. Learned counsel did not refer to the court any case to show the sentencing trend. The same learned Sessions Court judge had in another case (Criminal Appeal No. 42-09-97-III(I)) sentenced an accused to ten years and five strokes of whipping but the accused in that case pleaded guilty. Surely, it would not be in the interest of justice that the sentence in this case, after a full trial, should be lesser than that imposed on an accused who had pleaded guilty. Therefore, if anything, the learned Sessions Court judge appeared to be on the lenient side as she only imposed a single stroke of whipping. Since the learned deputy public prosecutor, Mr. Suhaimi bin Ibrahim, did not urge the court to increase the whipping, I do not propose to increase the whipping. In so far as the background of the accused is concerned, Mr. John Shek had argued that because (1) the accused is a first offender, (2) the long prison sentence would cause hardship to the family of the accused upon whom they are dependent for their livelihood and (3) the accused after serving such a long term would be too old to work and be a parasite to society, a shorter sentence should be imposed. I am of the view that those matters, urged by learned counsel, cannot out-weigh the seriousness of the offence. It is because that it is so easy for this sort of offence to be committed and because it is almost impossible for any child to defend herself against rape that a deterrent sentence is called for in order that such offence should be stopped. Any lesser sentence may not serve the purpose. Therefore, I am of the view that the sentence is neither excessive nor unlawful.

Conclusion

In the premises, I dismiss the appeal.